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IN THE
COURT OF APPEALS OF INDIANA

BRIAN C. COOKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A05-0607-CR-385
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0505-CM-184

April 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian C. Cookson appeals the denial of his Petition to Expunge Arrest Record. He presents the following restated issue for review: Does Indiana's statute pertaining to the expungement of arrest records, Ind. Code Ann. § 35-38-5-1 (West 2004), violate the Due Process Clause of the United States Constitution?

We affirm.

On May 5, 2005, the State charged Cookson with failing to stop at the scene of an accident (Count 1) and driving a commercial vehicle after disqualification (Count 2), both class C misdemeanors.[1] The trial court found probable cause and issued an arrest warrant. Cookson was subsequently arrested pursuant to these charges on May 11, and he bonded out of jail the following day. Thereafter, on July 12, Cookson entered into a plea agreement with the State, pursuant to which he pleaded guilty to Count 2, driving a commercial vehicle after disqualification. In exchange, the State agreed to dismiss Count 1 and agreed to time served, with a $150 fine and court costs. The trial court entered judgment and sentence accordingly and granted the State's motion to dismiss Count 1.

On April 13, 2006, Cookson filed a petition to expunge his arrest record with respect to Count 1. The State opposed the petition on the ground that Cookson had failed to meet the statutory requirements set forth in I.C. § 35-38-5-1(a)(2). Following a hearing, at which only argument was presented, the trial court denied Cookson's petition. Cookson now appeals, challenging the constitutionality of I.C. § 35-38-5-1. The statute provides in relevant part:

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[1] These charges arose out of an auto accident that occurred on or about May 2, 2005.

> (a) Whenever:
>
> * * *
>
> (2) all criminal charges filed against an individual are dropped because:
>
> (A) of a mistaken identity;
>
> (B) no offense was in fact committed; or
>
> (C) there was an absence of probable cause;
>
> the individual may petition the court for expungement of the records related to the arrest.
>
> * * *
>
> (d) …. Any agency desiring to oppose the expungement shall file a notice of opposition with the court setting forth reasons for resisting the expungement along with any sworn statements from individuals who represent the agency that explain the reasons for resisting the expungement within thirty (30) days after the petition is filed….
>
> (e) If a notice of opposition is filed and the court does not summarily grant or summarily deny the petition, the court shall set the matter for a hearing.
>
> (f) After a hearing is held under this section, the petition shall be granted unless the court finds:
>
> (1) the conditions in subsection (a) have not been met;
>
> (2) the individual has a record of arrests other than minor traffic offenses; or
>
> (3) additional criminal charges are pending against the individual.

While the statute does not expressly place the burden of proof with the petitioner, we have consistently held that the petitioner bears the burden of proof when requesting the expungement of his arrest record. *See*, *e.g.*, *State v. Reynolds*, 774 N.E.2d 902, 904 (Ind. Ct. App. 2002) ("trial court does not have the discretion to grant expungement when petitioner has failed to meet his burden of proving that he falls within the provisions of the statute"); *State v. Sotos*, 558 N.E.2d 909, 911 (Ind. Ct. App. 1990) ("petitioner bears the burden of proof when requesting the expungement of his record"), *trans. denied*.

Cookson argues that I.C. § 35-38-5-1 violates the 14th Amendment to the United States Constitution because "it shifts the burden of proof from the State to the defendant."

Appellant's Brief at 8. He further claims that shifting the burden "creates an insurmountable obstacle, for the statute requires [a defendant] to delve into the mind of a prosecutor to prove the State's motivation in dismissing a case." *Id*. at 11.

Every statute stands before us clothed with the presumption of constitutionality until clearly overcome by a contrary showing. *See State v. Reynolds*, 774 N.E.2d 902. Therefore, the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional, and all reasonable doubts are resolved in favor of the statute's constitutionality. *See Szpunar v. State*, 783 N.E.2d 1213 (Ind. Ct. App. 2003).

Cookson has not begun to meet his burden to show the statute is unconstitutional. Rather, he baldly asserts that the "mere shifting of the burden to the defendant is unconstitutional" because "[p]etitions for expungement are ancillary to the underlying criminal action." *Appellant's Brief* at 12. He then directs us to cases standing for the proposition that, in a criminal trial, the burden of proof is with the State to establish beyond a reasonable doubt all necessary elements of the crime charged. *See, e.g., Dillon v. State*, 257 Ind. 412, 275 N.E.2d 312 (1971); *Smith v. State*, 252 Ind. 425, 249 N.E.2d 493 (1969). Though true, this general proposition lends no support to Cookson's argument, as the instant case does not involve a determination of guilt during a criminal trial.[2]

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[2] We note that, even in the context of a criminal trial, burden shifting does not necessarily violate due process. For example, our Supreme Court upheld a legislative change in the law that shifted the burden of establishing the defense of insanity to the defendant. *See Price v. State*, 274 Ind. 479, 412 N.E.2d 783 (1980) (holding that the statute placing the burden of proof of insanity on a defendant is permissible under the United States Constitution); *see also* Ind. Code Ann. § 35-41-4-1(b) (West 2004) ("the burden of proof is on the defendant to establish the defense of insanity…by a preponderance of the evidence").

Moreover, resolution of this case does not even require consideration of the constitutional issue asserted by Cookson. *See Citizens Nat'l Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1242 (Ind. 1996) (expressing a "preference for reviewing the constitutional validity of statutes as they are applied to particular parties in a case" and observing that analysis should "focus first on potentially dispositive non-constitutional issues before turning to the constitutionality of the two statutes' application to the Fosters"). As set forth above, Cookson complains that the statute unconstitutionally shifted to him the burden to prove the prosecutor's motivation for dismissing the charge of failing to stop at the scene of an accident. While it appears clear the charge was not dismissed for one of the statutory grounds set forth in I.C. § 35-38-5-1(a)(2), under the circumstances of this case, the reason for the dismissal never needed to be established (whether by Cookson or the State) because not all of the criminal charges filed against Cookson had been dropped. *See* I.C. § 35-38-5-1(a)(2) (reason for dismissal only becomes relevant if *all* criminal charges filed against the individual have been dropped). In fact, pursuant to the plea agreement, Cookson pleaded guilty and was convicted of the remaining charge. Therefore, because the initial statutory condition was not met, we need not address Cookson's constitutional challenge to the alleged burden-shifting portion of the statute.

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.